in the decade before its creation, this Court applied the opposite presumption (*in favor of* preemption). Still other scholars have suggested, based on historical materials and arguments this Court has never considered, that the presumption should be rejected because it is inconsistent with the text of the Supremacy Clause as that provision would have been understood by eighteenth-century judges. Finally, this Court should take this occasion to reexamine the presumption because it is inconsistent in theory and application with other settled features of preemption law and canons of statutory interpretation.

ARGUMENT

I. This Case Presents An Invaluable Opportunity To Correct Deep Confusion In The Circuits Regarding The Applicability And Meaning Of The Presumption Against Preemption

In *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), the Court explained that, when Congress "legislate[s] in a field which the States have traditionally occupied," courts should "start with the assumption that the historic police powers of the States were not superseded by the Federal Act unless that was the clear and manifest purpose of Congress." In more recent cases, that starting "assumption" has evolved into a "presumption" disfavoring preemption. See, *e.g.*, *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001); *United States* v. *Locke*, 529 U.S. 89, 108 (2000); *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 518 (1992).

The Court has also recognized an exception to this presumption. In *Locke*, the Court observed that the passage quoted above from *Rice* was "followed by extensive and careful qualifications" and declined to apply the "artificial" presumption against preemption to the question whether Washington State's oil tanker regulations were preempted by federal law. 529 U.S. at 107. No such presumption "is triggered," Justice Kennedy's opinion for the Court explained, "when [a] State regulates in an area where there has been a history of significant federal presence." *Id.* at 108. Because the Washington tanker

regulations involved "interstate navigation" and "maritime trade" – areas "where the federal interest has been manifest since the beginning of our Republic" and Congress has "creat[ed] an extensive federal statutory and regulatory scheme" – the presumption against preemption was inapplicable. *Id.* at 99, 108; see also *Buckman*, 531 U.S. at 347, 353 (declining to apply presumption because "[p]olicing fraud against federal agencies" is "hardly" an area of traditional state authority and because plaintiffs' "fraud-on-the-agency" claims did not rely on "traditional state tort law").

In this case, the panel majority and the district court sharply disagreed over the meaning and applicability of the *Locke* exception. In the district court's view, this case fell squarely within the *Locke* exception because "[c]ongressional concern for national uniformity of regulation in the field of wireless telecommunications has been clear since the inception of commercial wireless telephone service." Pet. App. 63a. For that reason, and because "these lawsuits do not involve a traditional claim of compensation for personal injury" (*ibid.*), the district court refused to apply any presumption against preemption. In contrast, the panel not only held that the *Locke* exception was inapposite but also applied a "strong" variant of the presumption. *Id.* at 34 n.4, 41. The district court was wrong to rely on *Locke*, the Fourth Circuit reasoned, "because there is not the same federal presence in the wireless telecommunications area as there is in the area of maritime commerce." Pet. App. 35 n.4. A "strong" version of the presumption against preemption must be applied, the Fourth Circuit added, because the case implicated "state remedies, like tort remedies," and "no federal remedy exists." *Ibid.* (internal quotations omitted).

This case illustrates the great difficulty the lower courts have had in applying the presumption against preemption and the exception recognized in *Locke*. Indeed, as we next explain, the Fourth Circuit's analysis raises at least four questions about the meaning of the presumption and the *Locke* exception.

1. *When is a history of federal presence sufficiently "significant" to trigger the exception?* The lower courts have

had difficulty determining when a history of federal regulation attains the level of significance required to escape the presumption against preemption. At least in theory, the federal government's regulatory role could be evaluated quantitatively (how long?), qualitatively (how extensive?), or in both ways. In addition, the quantitative measurement could be viewed in absolute terms (how many years?) or in relative terms (how long in relation to either the federal government's lifespan or the age of the regulated technology?).

The district court in this case took the eminently sensible view that the duration of the federal government's involvement should be measured relative to the underlying technology being regulated. Accordingly, the district court emphasized that Congress's "concern for national uniformity of regulation in the field of wireless telecommunications has been clear *since the inception of commercial wireless telephone service*." Pet. App. 63a (emphasis added). The Fourth Circuit, however, took a different approach to measuring the federal government's historical role, concluding that "there is not *the same federal presence* in the wireless telecommunications area as there is in the area of maritime commerce." *Id.* at 35a n.4 (emphasis added). To the extent that the Fourth Circuit was relying on how long the federal government has regulated the underlying subject matter (wireless telecommunications) in comparison to the government's existence, its reasoning suffers from a glaring flaw. It should be obvious why federal regulation of cell phones is of more recent origin than regulation of seagoing ships: radio communications and cell phones are only a hundred years old and thirty years old, respectively, whereas commercial shipping predates the founding of the Republic. It is simply illogical to compare the proportion of the federal government's lifespan that has been spent regulating cell phones with the proportion spent regulating shipping.

There is another problem with the Fourth Circuit's simplistic comparison to the duration of federal regulation of "maritime commerce" in *Locke*. In *Locke*, this Court gave no hint that the necessary "history of significant federal presence" must rival

that of maritime commerce before the presumption against preemption will be avoided. By viewing maritime-like federal regulation as *necessary* to trigger the *Locke* exception, rather than as merely *sufficient* in that case to do so, the Fourth Circuit misunderstood the teachings of *Locke*. See also Pet. 25-26.[2]

The Fourth Circuit's approach to *Locke* conflicts with *Ting* v. *AT&T*, 319 F.3d 1126 (9th Cir.), cert. denied, 540 U.S. 811 (2003). There, the question was whether a California consumer-protection law was preempted by the Communications Act of 1934, the same statute implicated in this case. The Ninth Circuit concluded that "the long history of federal presence in regulating long-distance telecommunications" brought the case within the *Locke* exception (*id.* at 1136), making clear that – unlike the Fourth Circuit – it thought a 70-year "history of significant federal presence" was sufficient to vitiate any presumption against preemption. See also *Maier* v. *FCC*, 735 F.2d 220, 224 (7th Cir. 1984) (noting that Communications Act "provided a comprehensive scheme of federal regulation of * * * radio communication"). The Court should grant review if for no other reason than to resolve the conflict between the Fourth and Ninth Circuits over the meaning of the *Locke* exception and whether it covers the important area of interstate telecommunications by wire or radio.

Under the Fourth Circuit's view, even if federal regulations have governed a recently developed technology since its introduction, state laws that intrude on the federal regulatory structure might nevertheless enjoy a presumption against preemption merely because the tradition of federal regulation of the innovative technology is "not the same" as that over maritime commerce. For example, any effort by the FCC to regulate satellite radio through rules that preempt state and local law would face an extra hurdle and have to overcome a "presumption" before they would be given the effect desired by the agency. The

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[2] As petitioners note (Pet. 25-26), even if measured in absolute terms the federal government's comprehensive regulation of wireless communications actually *predates* the maritime statutes that were at issue in *Locke*.

Court should take this opportunity to clarify that the *Locke* exception does not require that federal regulation have been "manifest since the beginning of our Republic" (529 U.S. at 99), and that the proper frame of reference is not absolute, but relative, to the history of the technology or field of law.

2. *At what level of generality should the relevant "field" of federal regulation be defined?* In *Locke*, this Court explained that the presumption against preemption will not apply "when the State regulates in an *area* where there has been a history of significant federal presence." 529 U.S. at 108 (emphasis added). This Court did not, however, provide guidance on how courts should go about identifying the relevant "area" of regulation. The lower courts have struggled with that threshold question.

This case provides a good example of the need for clarification. Is the proper field of regulatory activity in this case (as the district court believed, see Pet. App. 63a (emphasis added)) "*commercial* wireless telephone service"? Is it "wireless telecommunications" generally, as the Fourth Circuit appeared to believe? *Id.* at 35 n.4. Alternatively, should the lower courts have confined themselves to the narrower field of technical standards for wireless service, which, as the district court noted (*id.* at 67a), has been an exclusively federal province? The threshold definition a reviewing court selects will drive the analysis and, in many cases, determine whether or not the *Locke* exception applies.

The lack of guidance from this Court on this issue has contributed to conflicting results in the lower courts. For example, in *Union Pacific Railroad* v. *California Public Utilities Comm'n*, 346 F.3d 851 (2003), cert. denied, 540 U.S. 1104 (2004), the Ninth Circuit held that the *Locke* exception does not apply to state laws regulating railroad safety, because the Federal Railroad Safety Act was passed only in 1970 and, "[p]rior to that time," "*railroad safety* was largely regulated by the states." *Id.* at 858, 864 n.17 (emphasis added). In contrast, the D.C. Circuit in *CSX Transportation, Inc.* v. *Williams*, 406 F.3d 667 (2005), held that the *Locke* exception *does* apply to railroad safety laws, observing that "just as Congress has

regulated ships and vessels since the beginning of the Republic," it has long regulated "our Nation's rail system." *Id.* at 673 (quoting *CSX Transp., Inc.* v. *City of Plymouth*, 92 F. Supp. 2d 643, 648 (E.D. Mich. 2000)). These conflicting results are at least partly traceable to disagreements over the proper level of generality at which the *Locke* inquiry should be conducted.

To dispel this confusion, this Court's guidance is needed. Defining the relevant field of federal regulation too narrowly risks making the *Locke* exception an irrelevance, because, with the ever-increasing rate of technological complexity and innovation, litigants frequently will be able to distinguish a new product, technology, or field from one that has come before (thus rendering legally irrelevant any prior history of federal regulation). Conversely, if courts define the area broadly, it will usually be possible to point to some prior federal laws or regulations that could trigger the *Locke* exception. Only this Court can eliminate the confusion in the lower courts about how *Locke* should be understood and applied. See also Pet. 26 n.6.[3]

3. *Is there a "strong" version of the presumption against presumption – and of the* Locke *exception?* The Fourth Circuit not only declined to apply the *Locke* exception but also applied an especially "strong" version of the presumption against preemption because "no federal remedy exists." Pet. App. 35 n.4 (internal quotations omitted). In stark contrast, the D.C. Circuit has suggested, in *CSX Transportation, Inc.* v. *Williams*, *supra*, that if the *Locke* exception applies it is the argument *for* pre-

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[3] This Court faced a very similar problem – and need to give the lower courts guidance – in its cases involving qualified immunity. In those cases, the critical issue is whether a government official's conduct violated a right that was "clearly established" at the time the conduct occurred. *Anderson* v. *Creighton*, 483 U.S. 635, 638 (1987). But "[t]he operation of this standard * * * depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified." *Id.* at 639. In recent years, this Court has taken a series of cases in order to make that point as well as to clarify for the lower courts how the qualified immunity analysis must be conducted. See, *e.g.*, *Groh* v. *Ramierz*, 540 U.S. 551 (2004); *Hope* v. *Pelzer*, 536 U.S. 730 (2002).

emption – not the presumption *against* – that must be treated as "particularly strong." 406 F.3d at 673.

The Fourth Circuit's suggestion that the presumption against preemption comes in both regular and super strengths is mistaken. The only authority the court cited – its prior decision in *Abbot* v. *American Cyanamid Co.*, 844 F.2d 1108, 1112 (4th Cir.), cert. denied, 488 U.S. 908 (1988) – purported to draw that principle from *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 250-51 (1984). But, as this Court has since made clear, *Silkwood* does not stand for any such broad principle; rather, it turned on "specific evidence" of Congress's intent to preserve state-law remedies under the Price Anderson Act and other statutes relating to nuclear power plants. *Buckman*, 531 U.S. at 351-52.

In contrast, the D.C. Circuit's suggestion that courts should approach some cases with a presumption *in favor of* preemption *does* find substantial support in this Court's decisions. The Court has long applied that rule where Congress has legislated in an area of "dominant" federal interests. For example, in *Hines* v. *Davidowitz*, 312 U.S. 52 (1941), the Court held that the Alien Registration Act of 1940, embodying a comprehensive federal system of alien registration, preempted a Pennsylvania law regulating the same subject. Given the uniquely national nature of "the general field of foreign affairs, including power over immigration," the Court explained, state authority to act concurrently in this area must be "restricted to [its] narrowest limits." *Id.* at 68. At the same time, however, this competing presumption *in favor of* preemption typically is not combined with the *Locke* exception. Whether or not such a combination is appropriate, these circuit decisions further underscore the need for clarification by this Court.

4. *When do state-law "remedies" and claims grounded in tort law fall within a traditional area of state authority?* This Court's decisions in *Buckman* and in *Aetna Health Inc.* v. *Davila*, 124 S. Ct. 2488 (2004), make clear that not every lawsuit advancing claims nominally based on state tort law falls within an area of traditional state authority. In *Buckman*, this

Court pointedly contrasted the plaintiffs' novel "fraud-on-the-FDA claims" with "traditional state law tort principles." 531 U.S. at 352; accord *id.* at 353. Following this Court's lead, the district court declined to apply the presumption against preemption in part because respondents' lawsuit "do[es] not involve a traditional claim of compensation for personal injury" (but is rather, at bottom, a challenge to the FCC's judgment that headsets are unnecessary, dressed up in the garb of a tort lawsuit). Pet. App. 63a. The Fourth Circuit, however, ignored this consideration and even suggested that the presumption should apply to any case where "state remedies, like tort remedies," might be preempted. *Id.* at 35a n.4.

But this Court has never suggested that any case involving state "remedies" is subject to the anti-preemption presumption, and the Fourth Circuit's refusal to look behind the labels to the true nature of respondents' tort claims simply ignores *Buckman*'s teachings. Likewise, in *Davila*, the Fifth Circuit had pointed out that the preemptive federal statute (ERISA) did not furnish tort-type remedies and held that the plaintiffs' pursuit of such remedies under state law was a reason to hold their claims not preempted. This Court unanimously rejected that reasoning as "erroneous" (124 S. Ct. at 2498), explaining that a federal decision *not* to provide a tort remedy can itself have strong preemptive effect. The Fourth Circuit's decision is inconsistent with *Davila* as well as *Buckman*.

II. The Court Should Take This Opportunity To Reexamine The Presumption Against Preemption

In recent years, the "presumption against preemption" has come under attack from a variety of judges, legal scholars, and prominent practitioners. These critics have challenged the presumption's historical pedigree, its logical compatibility with the rest of preemption law, its consistency with the text of the Supremacy Clause, and its validity in light of the Constitution's structure. This Court has not yet considered most of these potent criticisms. The Court should use this case to conduct such a reexamination.

1. Some Members of this Court have suggested, without elaboration, that the presumption against preemption is rooted in fundamental principles of federalism embodied in the Constitution. See, *e.g.*, *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 533 & n.1 (1992) (Blackmun, J., concurring). In recent years, however, that view has been persuasively challenged by legal scholars and prominent practitioners. For example, Professor Viet Dinh has argued that, "[c]ontrary to the prevailing wisdom and the unexplored assumptions of Supreme Court dicta, the constitutional structure of federalism does *not* admit to a general presumption against federal preemption of state law." Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2087 (2000) (emphasis added). Solicitor General Paul Clement has advanced the same argument, see Clement & Dinh, *When Uncle Sam Steps In*, LEGAL TIMES, June 19, 2000, at 66, as has Professor Jack Goldsmith. See Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 S. CT. REV. 175, 182 (presumption is "difficult to justify" on constitutional grounds).

As these commentators have explained, the presumption against preemption finds no support in the text or the structure of the Constitution. The text doesn't support it because the Supremacy Clause *displaces* state authority, in marked contrast to other provisions that serve as the basis for other clear-statement rules (such as the Tenth and Eleventh Amendments, which explicitly *preserve* state power). Nor can support for the presumption be derived from the Constitution's structure:

> The question in pre-emption cases is not whether Congress has the authority to enact a law, but simply whether federal legislation ought to be exclusive. Thus a presumption *against* pre-emption would not be a presumption against federal laws in areas of traditional state concern, but rather a presumption *in favor of overlapping and potentially conflicting regulations* at federal, state, and local levels. Nothing in the Constitution indicates any particular solicitude for federal laws that duplicate state laws without displacing them.

Clement & Dinh, *supra*, at 66 (emphasis added).

Drawing on the history of the Constitutional Convention, scholars have argued persuasively that Congress's power to preempt derives from the enumerated powers in Article I, Section 8, including the Necessary and Proper Clause, rather than from the Supremacy Clause in Article VI. See Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 803-07 (1996); Dinh, *supra*, 88 GEO. L.J. at 2088. Under this view, the Supremacy Clause is properly regarded as a "constitutional choice of law rule, one that gives federal law precedence over conflicting state law" – but one that comes into play "only at the post-enactment stage, where a state law conflicts to some degree with a federal law." Dinh, *supra*, 88 GEO. L.J. at 2090; accord Gardbaum, *supra*, 74 TEX. L. REV. at 804. "Given this constitutional structure," Professor Dinh explains, "questions of constitutional policy in preemption * * * were answered by the framers with the specific enumerations and limitations of federal legislative power in Article I." Dinh, *supra*, 88 GEO. L.J. at 2092. Thus, when Congress has enacted legislation that is

> consistent with its limited, enumerated powers, the question ceases to be one about the vertical distribution of powers between federal and state governments – after all, the Constitution gave Congress the power to legislate, and Congress has exercised that power. Rather, the question becomes one of horizontal division of federal governmental functions among the three branches. Specifically, the task for the Court is to discern what Congress has legislated and whether such legislation displaces concurrent state law – in short, the task of statutory construction. If, in performing this task, the Court were to systematically favor one result over another, it would disrupt the constitutional division of power between federal and state governments, rewrite the laws enacted by Congress, or both. Such actions * * * risk an illegitimate expansion of the judicial function.

Ibid. Accordingly, constitutional structure strongly suggests that "there should be no general systematic presumption against or in favor of preemption." *Ibid.*

2. Professor Caleb Nelson of the University of Virginia Law School has reached the same conclusion by a different route. Relying on a detailed analysis of long-overlooked historical materials, Professor Nelson has shown that the presumption against preemption *is contrary to the text of the Supremacy Clause*. See Nelson, *Preemption*, 86 VA. L. REV. 225, 235-64, 292-93 (2000). According to Professor Nelson,

> The final phrase in the Supremacy Clause – "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding" – is a "non obstante" clause. Although such clauses are no longer familiar to us, legal draftsmen in late eighteenth-century America used them to acknowledge that a statute might contradict some other laws and to instruct courts *not* to apply the traditional presumption against implied repeals. When a statute contained a non obstante clause, courts did not have to struggle to harmonize the statute with prior laws; they could give the statute *its natural meaning* and let it displace whatever law it contradicted.
>
> The presence of a non obstante provision in the Supremacy Clause * * * establishes an important rule of construction. The non obstante provision tells courts that even if a particular interpretation of a federal statute would contradict (and therefore preempt) some state laws, this fact is not automatically reason to prefer a different interpretation. It follows that courts should *not* automatically seek "narrowing" constructions of federal statutes solely to avoid preemption.

Id. at 232 (emphasis added; footnote omitted); see also Goldsmith, *supra*, 2000 S. CT. REV. at 184 (agreeing with Nelson that "the Supremacy Clause's non obstante clause * * * was designed precisely to eliminate any residual presumption").

This Court has not yet considered Professor Nelson's compelling criticism of the presumption against preemption based on the text of the Supremacy Clause. Cf. *Geier* v. *American*

Honda Motor Co., 529 U.S. 861, 908 n.22 (2000) (dissenting opinion) (alluding to argument but declining to address it).[4]

3. Other recent scholarship has refuted the assumption that the "presumption against preemption" is deeply rooted in the Nation's history or in principles of federalism. This Court's earliest preemption cases make no mention of any such presumption. See, *e.g.*, *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 210 (1824); *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 343-44 (1816); *Ware* v. *Hylton*, 3 U.S. (3 Dall.) 199 (1796). In fact, the presumption (or "assumption") was not recognized by this Court until the 1920s and 1930s. See Davis, *Unmasking The Presumption in Favor of Preemption*, 53 S.C. L. REV. 967, 973-83 (2002); Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 785-808 (1994).

What is more, in the first several decades of the twentieth century this Court recognized a strong generalized presumption *in favor of* preemption. Thus, the preemption doctrine

> has evolved * * * from one based on an assumption of congressional legislative exclusivity and almost certain preemption of state regulation to a doctrine, in the mid-part of the century, based on a search for congressional intent to preempt so that state laws, particularly those based on historical police powers, would not be needlessly displaced.

Davis, *supra*, 53 S.C. L. REV. at 971. Accord Gardbaum, *supra*, 79 CORNELL L. REV. at 801-08.

The Court's "official shift from automatic preemption to an intent-based test during the 1930s," Professor Gardbaum explains, was closely tied to "the enlargement of the commerce power" during this time period, and originated in the concern that without such a shift Congress's expanded powers "would otherwise have threatened to preempt too much state power."

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[4] Professor Nelson's article also contends, based on a separate line of argumentation and separate grounds, that this Court should abandon obstacle preemption. PLAC disagrees with that contention, as did this Court in *Geier*.

Gardbaum, *supra*, 79 CORNELL L. REV. at 808. Although that practical concern may well justify the abandonment of a generalized presumption in favor of preemption whenever *any* federal law exists, it hardly supports the use of a presumption against preemption in the form adopted in *Cipollone* – as a rule that all express preemption clauses must be narrowly construed.

This recent scholarship undercuts any suggestion that the presumption against preemption has deep historical roots in our legal traditions or in the federalism principles animating the Constitution. Instead, the presumption is of relatively recent origin; it was preceded by a contrary presumption favoring preemption; and it was developed out of pragmatic concerns that do not justify its current function.[5]

4. The presumption against preemption is also difficult to reconcile with other, well-settled principles of preemption law and statutory interpretation. It is at odds logically, for example, with the universally acknowledged principle that "[p]re-emption fundamentally is a question of congressional intent." *English* v. *General Elec. Co.*, 496 U.S. 72, 78-79 (1990). If preemption turns on what Congress intends, it is difficult to see why an inquiry into intent should be systematically distorted by a threshold assumption. Two Members of this Court have strenuously objected, on precisely this ground, to the use of the presumption in cases involving express preemption. See *Cipollone*, 505 U.S. at 544 (Scalia, J., joined by Thomas, J., concurring in the judgment in part and dissenting in part) (Court's "job is to interpret Congress' decrees of pre-emption neither narrowly nor broadly, but in accordance with their

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[5] Professor Goldsmith has also shown that the presumption against preemption cannot sensibly be justified based on a prediction about how Congress "usually" acts, or on the need to provide "notice" to the States (because "*any* default rule will put the states on notice as long as the rule is clear"), or on the ground that it safeguards the political checks of federalism against judicial usurpation (because erroneous judicial decisions *denying* preemption are no less of an affront to the will of the political branches). Goldsmith, *supra*, 2000 S. CT. REV. at 183-87 (emphasis added).

apparent meaning"). Nor is it easy to see why it would make sense, under a "purpose-based" approach to statutory interpretation, for courts automatically to presume that a "reasonable member of Congress" intended either no preemption, or only limited preemption, where Congress *itself* has chosen to include an express preemption clause in a statute. S. BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 88, 97-101 (2005); *id.* at 99 (criticizing excessive reliance on "canons" as obscuring Congress's true purpose).[6]

The presumption against preemption also coexists uneasily with the settled principle that the importance of a State's interest underlying a law that is allegedly preempted is *irrelevant* to the preemption analysis. See, *e.g.*, *Fidelity Federal Savings and Loan Ass'n.* v. *de la Cuesta*, 458 U.S. 141, 153 (1982) ("These principles [governing preemption] are not inapplicable here simply because real property law is a matter of special concern to the States: 'The relative importance to the State of its own law is *not material* when there is a conflict with a valid federal law.'") (emphasis added) (quoting *Free* v. *Bland*, 369 U.S. 663, 666 (1962)); *DeCanas* v. *Bica*, 424 U.S. 351, 357 (1976) ("[E]ven state regulation designed to protect vital state interests must give way to paramount federal legislation.").

Nor does the presumption against preemption fit comfortably within the class of federalism-based "substantive" canons of statutory construction used by this Court "to harmonize statutory meaning with policies rooted in the * * * Constitution." W. ESKRIDGE ET AL., LEGISLATION AND STATUTORY INTERPRETATION 329-30 (2000); see, *e.g.*, *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234, 242 (1985) ("Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention *unmistakably clear* in the language of the statute.") (emphasis added). For one thing, as

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[6] The judicially created "presumption" makes no more sense when applied to forms of "implied" preemption, where it has the effect of allowing greater conflict with (or frustration of the purposes of) federal law by state law than the Supremacy Clause would otherwise permit.

explained above, the presumption against preemption is *not rooted in principles of federalism. For another*, as Justices Scalia and Thomas correctly noted in *Cipollone*, in "none" of these other settings does a clear-statement rule "exist[] alongside a doctrine whereby the same result so prophylactically protected from careless explicit provision can be achieved *by sheer implication*, with no express statement of intent at all." 505 U.S. at 547 (emphasis in original). And in none of these other settings does a clear-statement rule coexist with the *opposite* presumption (such as the established presumption *in favor of* preemption in areas, such as foreign affairs, where federal interests are "dominant"). Only in the law of federal preemption does this "novel regime" exist. *Ibid.*

5. This Court has acknowledged that the principles governing federal preemption are "already • • • difficult to apply" and, accordingly, it has pointedly declined to "complicat[e]" this important area of law "further" by adopting new presumptions and special burdens that would create "practical difficulties" for litigants and lower courts alike. *Geier*, 529 U.S. at 873. The same salutary objective of clarifying and rationalizing preemption law supports using this case to reconsider, and perhaps abandon or limit, the flawed presumption against preemption.

Finally, further review would bring the added benefit of dispelling confusion that may have been caused by this Court's own inconsistent treatment of the presumption against preemption, which PLAC has previously documented. See Br. of PLAC As *Amicus Curiae*, *United States* v. *Locke*, Nos. 98-1701 & -1706, at 5-7; see also *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 63 (2002) (relying on "natural[] read[ing]" of express preemption clause without any mention of presumption); *Engine Manufacturers Ass'n* v. *South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 256 (2004) ("not all Members of this Court agree" on the use of a "presumption against preemption").

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

PRODUCT LIABILITY ADVISORY COUNCIL, INC.
LIST OF CORPORATE MEMBERS

3M
Altec Industries
Altria Corporate Services, Inc.
American Household, Inc.
American Suzuki Motor Corporation
Amgen Inc.
Andersen Corporation
Anheuser-Busch Companies
Appleton Papers, Inc.
Arai Helmet, Ltd.
Astec Industries
Aventis Pharmaceuticals, Inc.
BASF Corporation
Bayer Corporation
Bell Sports
Beretta U.S.A Corp.
BIC Corporation
Biro Manufacturing Company, Inc.
Black & Decker (U.S.) Inc.
BMW of North America, LLC
Boeing Company
Bombardier Recreational Products
BP America Inc.
Bridgestone Americas Holding, Inc.
Briggs & Stratton Corporation
Bristol-Myers Squibb Company
Brown-Forman Corporation
CARQUEST Corporation
Caterpillar Inc.
Chevron Corporation
Continental Tire North America, Inc.
Cooper Tire and Rubber Company
Coors Brewing Company
Crown Equipment Corporation
DaimlerChrysler Corporation

Deere & Company
The Dow Chemical Company
E & J Gallo Winery
E.I. DuPont De Nemours and Company
Eaton Corporation
Eli Lilly and Company
Emerson Electric Co.
Engineered Controls International, Inc.
Estee Lauder Companies
Exxon Mobil Corporation
Ford Motor Company
Freightliner LLC
General Electric Company
General Motors Corporation
GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Guidant Corporation
Harley-Davidson Motor Company
The Heil Company
Honda North America, Inc.
Hyundai Motor America
ICON Health & Fitness, Inc.
Illinois Tool Works, Inc.
International Truck and Engine Corporation
Isuzu Motors America, Inc.
Johnson & Johnson
Johnson Controls, Inc.
Joy Global Inc., Joy Mining Machinery
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Koch Industries
Kolcraft Enterprises, Inc.
Komatsu America Corp.
Kraft Foods North America, Inc.
Lincoln Electric Company
Masco Corporation
Mazda (North America), Inc.

McNeilus Truck and Manufacturing, Inc.
Medtronic, Inc.
Mercedes-Benz of North America, Inc.
Michelin North America, Inc.
Miller Brewing Company
Mine Safety Appliances Company
Mitsubishi Motors North America, Inc.
Nintendo of America, Inc.
Niro Inc.
Nissan North America, Inc.
Novartis Consumer Health, Inc.
Novartis Pharmaceuticals Corporation
Occidental Petroleum Corporation
PACCAR Inc
Panasonic
Pentair, Inc.
Pfizer Inc.
Pharmacia Corporation
Porsche Cars North America, Inc.
PPG Industries, Inc.
Purdue Pharma L.P.
Putsch GmbH & Co.KG
The Raymond Corporation
Raytheon Aircraft Company
Remington Arms Company, Inc.
Rheem Manufacturing
RJ Reynolds Tobacco Company
Schindler Elevator Corporation
SCM Group USA Inc.
Shell Oil Company
The Sherwin-Williams Company
Smith & Nephew, Inc.
St. Jude Medical, Inc.
Sturm, Ruger & Company, Inc.
Subaru of America, Inc.
Synthes (U.S.A.)
Terex Corporation
Textron, Inc.

Thomas Built Buses, Inc.
TK Holdings
The Toro Company
Toshiba America Incorporated
Toyota Motor Sales, USA, Inc.
TRW Automotive US LLC
Tyson Foods, Inc.
UST (U.S. Tobacco)
Volkswagen of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Company
Water Bonnet Manufacturing, Inc.
Watts Water Technologies, Inc.
Whirlpool Corporation
Wyeth
Yamaha Motor Corporation, U.S.A.
Yokohama Tire Corporation
Zimmer, Inc.

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IN THE

Supreme Court of the United States

NOKIA, INC., *et al.*,

Petitioners,

v.

GARRETT NAQUIN, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a not-for-profit corporation that has neither a parent nor stockholders.

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest federation of businesses, representing an underlying membership of more than three million businesses and organizations, with direct members of every size in every industrial sector and geographic region of the country. Chamber members transact business in all or nearly all of the United States, as well as in a large number of countries around the world. An important function of the Chamber is the representation of its members' interests before the courts, Congress, and the Executive Branch.

To that end, the Chamber has participated as *amicus curiae* in numerous cases before this Court that have raised issues of vital concern to the Nation's business economy, including several cases that addressed the subject of federal preemption. *See, e.g.*, *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000); *United States v. Locke*, 529 U.S. 89 (2000); *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995). The Chamber has long been a strong advocate of national uniformity in the regulatory sphere. The predictability engendered by a uniform federal regulatory scheme promotes efficient business operations and protects businesses whose products and services are marketed nationwide against the costs and risks of navigating a maze of inconsistent state laws and regulations.

Many of the Chamber's members engage in multi-state operations. The question whether conduct otherwise subject to a uniform federal regulatory scheme can nevertheless be "regulated" via the application of state tort law is therefore of direct interest to Chamber members. The decision of the Fourth Circuit Court of Appeals directly implicates that

interest. Because the Fourth Circuit's preemption analysis is flatly inconsistent with this Court's settled agency preemption jurisprudence, and because its reasoning could have far-reaching and disastrous implications for countless interstate businesses that depend upon the certainty, predictability, and uniformity of a federal regulatory framework, the Chamber and its members have a strong interest in the Court granting plenary review and correcting the erroneous judgment of the court below. The Chamber files this brief with the consent of all parties.[1]

SUMMARY OF THE ARGUMENT

The federal regulations at issue here establish comprehensive emissions testing and certification standards and set a maximum level of acceptable radio frequency ("RF") emissions for handheld wireless telephones. They are the product of years of agency study under a congressional mandate to balance competing national priorities in public health and safety against the national imperative of a seamless and reliable interstate wireless communications network. The decision below nonetheless held that this comprehensive federal regulatory regime does not preempt state tort law in the absence of an express *congressional* pronouncement of intent that the federal regulatory scheme operates to the exclusion of state law. The Fourth Circuit's newly-minted standard for agency conflict preemption runs directly contrary to decades of settled preemption jurisprudence, and it invites lay juries, under various state products liability and tort laws, to nullify the detailed federal standards governing certification of wireless telephones and maximum, "safe" RF emissions levels. As the Petition points out, after *Pinney*, state juries are invited to perform their own risk/utility balancing, to

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[1] No counsel for any party authored this brief in whole or in part. No person or entity other than the Chamber, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

impose an endless variety of requirements for RF emissions testing and certification, and even to establish new maximum levels of RF emissions with no regard for the federal RF emissions standard. Pet. 2-3, 23.

The implications of the court below's new agency preemption standard extend well beyond the wireless telephone industry. Under the Fourth Circuit's new preemption framework, duly enacted federal regulations lack independent preemptive force unless Congress expressly indicates that the federal regulations preempt state law. After *Pinney*, every federal regulatory scheme intended to have uniform nationwide application that falls short of this new "congressional plain statement" requirement can be undermined by any lay jury applying state tort law, at least within the geographic boundaries of the Fourth Circuit. The implications for interstate business are staggering—in essence, a federal agency's comprehensive product analysis and pre-market approval based on specified design, operational, or labeling standards is rendered meaningless. Consequently, the decision will generate uncertainty and potentially unbridled retroactive liability for countless companies that do business across the Nation.

ARGUMENT

I. THE FOURTH CIRCUIT DISREGARDED FUNDAMENTAL AND LONG-ESTABLISHED PRINCIPLES OF AGENCY PREEMPTION

This case poses the question whether a comprehensive federal regulatory scheme, uniform in its application and nationwide in its reach, can be cast aside in favor of *ad hoc* "standards" set by juries applying state tort law unless Congress expressly delegates preemptive authority to the agency. The court below, ignoring or misreading settled principles of conflict preemption, held that the federal scheme can be subjected to such a nullification by dissection. In doing so, the decision below draws into question not only the uniform applicability of the Federal Communication

Commission's ("FCC") RF emissions standard, but also the function of countless federal regulatory schemes that provide certainty and uniformity critical to companies whose business crosses state lines. These include many areas where Congress has entrusted federal agencies to evaluate product safety and efficacy based on national scientific standards and where federal regulations mandate certain design, labeling, and operational standards that must be exclusive to have any meaning or effect.

1. The Fourth's Circuit's conclusion that a federal regulation cannot preempt state common law in the absence of *statutory* language reflecting preemptive intent both ignores the logical import of a broad delegation of regulatory authority to an expert agency and misapplies settled conflict preemption precedents.

In the Communications Act of 1934, Congress conferred broad authority on the FCC to regulate all technical aspects of interstate communication by radio. 47 U.S.C. § 303; *see also Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 700 (1984). Of particular relevance here, the FCC's plenary authority over radio communications extends specifically to "the kind of apparatus to be used *with respect to its external effects* and the purity and sharpness of the emissions from each station and from the apparatus therein." 47 U.S.C. § 303(e) (emphasis added). Pursuant to that sweeping statutory mandate, and in discharge of its obligations under the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4335, the FCC, in consultation with the Food and Drug Administration ("FDA") and other agencies, created detailed standards that specify pre-market testing and equipment authorization procedures and set a maximum acceptable level of RF emissions from all wireless transmitters, including cellular telephones. *See* 47 C.F.R. § 2.1093(d). In fact, Congress took the extraordinary step of commanding the FCC to swiftly conclude its RF rulemaking, so that national standards would be in place. Pub. L. No. 104-204, § 704(b), 110 Stat. 56 (1996). As the Petition

points out, both the FCC and the FDA have declared that any wireless cell phone that complies with the FCC's RF testing and emissions standards "is a 'safe' phone." *See* Pet. 20 n.4 (quoting FCC/FDA Website – *Market Sense, Cell Phones: Facts, Fiction, Frequency, available at* <http://www.fcc.gov/cgb/cell_phones.html>). These expert agencies have also concluded that a "headset mandate," part of the relief sought by these plaintiffs, would not serve the public interest or increase RF safety. *Id.*

Just four years after the FCC issued its RF regulations, Respondents filed a class-action complaint in Louisiana state court alleging that wireless telephones that satisfy the FCC's RF emissions standards are nevertheless defective and unreasonably dangerous under state tort law, based on the level of RF emissions they produce.[2] As is increasingly typical of "consumer" class actions, Respondents, like other wireless-telephone class action plaintiffs, did not seek damages for any *physical* injury they attribute to the use of cellular telephones; instead, they sought a judgment directing manufacturers of wireless telephones to provide headsets for every wireless telephone, along with warnings that wireless phones are unsafe when used without a headset.[3]

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[2] Respondents' complaint (*Naquin*) was one of five similar class-action complaints filed in various state courts. The five complaints were removed to the appropriate federal district courts and were consolidated for pretrial proceedings in the U.S. District Court for the District of Maryland by the Judicial Panel on Multidistrict Litigation. *See In re Wireless Tel. Radio Frequency Emissions Prods. Liab. Litig.*, 170 F. Supp. 2d 1356 (J.P.M.L. 2001). The Fourth Circuit's decision was rendered *sub nom Pinney v. Nokia, Inc.*, 402 F.3d 430 (4th Cir. 2005). The Fourth Circuit found a lack of subject matter jurisdiction in four of the five consolidated cases; it reached the merits of the federal preemption question only in Respondents' case, in which jurisdiction, based on diversity of citizenship, was not at issue. The Petition concerns only Respondents' case, *Naquin v. Nokia, Inc.* (No. 03-1433, 4th Cir.).

[3] Indeed, the complaint is based on the proposition that alleged scientific uncertainty as to RF effects requires a more prophylactic approach to RF safety. Thus, these lawsuits are more in the nature of a

In permitting this state law challenge, the Fourth Circuit was indifferent to the FCC's considered judgment that telephones compliant with the RF standard are "safe" for use by consumers, as well as the agency's repeated indications that it intended its cellular telephone regulations to apply uniformly and *exclusively* nationwide. *See* Pet. 7-8, 19, 20 n.4, 24. The Fourth Circuit also disregarded the FCC's plenary authority to regulate every aspect of cellular telephone technology, including equipment design and signal strength. Indeed, the court completely ignored both the preemptive scope of the RF *regulation* and whether the state law claims constituted an "obstacle" to achievement of the regulation's goals. Rather, the decision below concluded that the FCC's validly enacted regulation cannot preempt even conflicting state tort law in the absence of clear "evidence" of "a congressional goal of achieving preemptive national RF radiation standards for wireless telephones." Pet. App. 42a, 43a.

2. The Fourth Circuit's preemption analysis built error upon error. It is by now settled beyond dispute that, to the extent that state law *actually conflicts* with federal law, either because it would be impossible to comply with both or because state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," state law is preempted, even in the absence of an express statutory provision specifying preemption of state law. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *see also Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000); *Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1977). As these decisions make clear, conflict preemption is triggered not only when compliance

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petition for review challenging the FCC RF rules as insufficiently protective, than a traditional state tort suit alleging that a specific product has directly caused physical or emotional injury.